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Supreme Court, U. S.

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No. 97-1909

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MURPHY BROS., INC.,

Petitioner,

v.

MICHETTI PIPE STRINGING, INC.,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF OF PETITIONER

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QUESTION PRESENTED

Whether the thirty-day removal period provided by 28 U.S.C. § 1446(b) begins to run from the date a named party receives a copy of the initial pleading, by any means and from any source, even if that named party has not yet been made a party defendant by service of process.

PARTIES TO THE PROCEEDING

All parties to the proceedings in the Court of Appeals are reflected in the caption of the case.

RULE 29.1 LISTING

Petitioner, Murphy Bros., Inc., has no parent corporation nor any nonwholly owned subsidiaries.

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BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (J.A. A-25) is reported at *Michetti Pipe Stringing, Inc. v. Murphy Brothers, Inc.*, 125 F.3d 1396 (CA11 1997). The opinion of the United States District Court for the Northern District of Alabama (J.A. A-22) is unreported.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its judgment on October 24, 1997. (J.A. A-25). The Court of Appeals denied a timely petition for rehearing and suggestion for rehearing en banc on February 23, 1998. (J.A. A-1). The petition for writ of certiorari was filed on May 26, 1998, and was granted on November 2, 1998. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 28, section 1446(b) provides, in pertinent part:

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

STATEMENT OF THE CASE

On January 26, 1996, Michetti Pipe Stringing, Inc. ("Michetti") filed suit in the Circuit Court of Jefferson County, Alabama, seeking damages for breach of contract and fraud against Murphy Bros., Inc. ("Murphy"). (J.A. A-2). The case arises out of a dispute over payment for additional work allegedly performed by Michetti pursuant to a construction contract with Murphy.

A. The Negotiations

For many weeks prior to the filing of this suit, the parties had engaged in conversations and discussions attempting to resolve their dispute. These conversations and discussions were conducted between Murphy's Vice President - Risk Manager, Rick Moskowitz, and counsel for Michetti, J. David Pugh, Esq.

On January 29, 1996, in the midst of the negotiations, counsel for Michetti sent a letter, via facsimile transmission, to Rick Moskowitz and attached a "courtesy copy" of the filed complaint. (J.A. A-16 - A-17, A-2 - A-5). The letter stated:

When we did not hear back from you last week after our conversation on Wednesday . . . we had no alternative but to file a complaint to preserve all of our rights. A copy of the complaint is enclosed.

Please understand that Michetti had no other choice but to take this step to preserve all of its rights and remedies. However, Michetti would like to continue to explore the possibilities of resolving this matter without continuing the litigation. Accordingly, we are providing a courtesy [copy] of the complaint to you, and we hope to hear from you soon to discuss ways of settling this matter.

(J.A. A-17).

Mr. Moskowitz acknowledged receipt by letter dated January 30, 1996, setting forth his understanding of how the parties had agreed to proceed following their conversation on Wednesday and noting his belief that swifter action on his part would not have averted the suit which was filed so soon (on Friday) after their Wednesday conversation. Mr. Moskowitz concluded by stating:

However, I am sure when I report to Bill and Mike [Murphy] on this cause of action being filed that they will instruct me

to retain counsel to file a Special Appearance, and any subsequent forum shopping will be similarly handled. Further, as the action, if any, will ultimately lie here [in Illinois], we will strenuously defend by raising both the payment in full and the Lien Waiver Releases as our defenses and bar to the suit, whether in state court or removed to Federal District court. And, in Illinois, the remedy of sanctions is available to us for pleadings which are filed and found not to be in good faith when signed by either or both counsel and a party litigant.

(J.A. A-19).

The parties continued to correspond and discuss settlement possibilities until February 12, 1996, when service of process was perfected and Murphy refused to negotiate further.

B. Service and Removal

Service of process was perfected on Murphy on February 12, 1996, by certified mail service on its registered agent for service of process. (Circuit Court Case Action Summary p. 1). On March 13, 1996, Murphy removed the action to the United States District Court for the Northern District of Alabama, pursuant to 28 U.S.C. § 1441. (J.A. A-6). The jurisdiction of the district court was invoked under 28 U.S.C. § 1332 based on diversity of citizenship, Michetti being a Canadian company with its principal place of business in Nisku, Alberta, Canada and Murphy being an Illinois corporation with its principal place of business in East Moline, Illinois. (J.A. A-6 - A-7).

On April 3, 1996, Michetti moved to remand the case to state court. (J.A. A-9) Michetti argued that pursuant to the plain meaning of 28 U.S.C. § 1446(b) the time for removal begins to run from the defendant's "receipt ... through service or otherwise" of a copy of the complaint and that the removal was untimely because it was not filed within thirty days after Murphy

received the courtesy copy of the complaint via facsimile. (J.A. A-9 - A-14).

C. Denial of Remand

The district court denied the motion to remand, concluding that the removal period commenced when Murphy was served with process. (J.A. A-21). The court agreed with *City National Bank of Sylacauga v. Group Data Services*, 908 F. Supp. 896 (N.D. Ala. 1995), quoting:

The 1949 addition [to section 1446(b)] supplied the words "or otherwise" so as to provide for removal in states where an action is commenced merely by the service of a summons and there is no requirement that the initial pleading setting forth the claim for relief be served or filed until later. The language relied upon by plaintiff in § 1446(b) has no field of operation in states, such as Alabama, where the action is commenced by the filing of the complaint (Ala. R. Civ. P. 3) but a copy of that complaint must be served [a]long with the summons (Ala. R. Civ. P. 4).

(J.A. A-24). The district court concluded that the removal was timely because it was filed within thirty days after service of process. (J.A. A-21).

The district court certified the issue for interlocutory appeal to the United States Court of Appeals for the Eleventh Circuit in an order dated May 1, 1996. (District Court Civil Docket, p. 2). That certification was renewed on September 17, 1996. (District Court Civil Docket, p. 2). The court of appeals granted Michetti's petition for permission to appeal under 28 U.S.C. § 1292(b) by order dated December 5, 1996. (J.A. A-1).

D. Reversal by Court of Appeals

On October 24, 1997, the court of appeals reversed the district court. *Michetti Pipe Stringing, Inc. v. Murphy Brothers, Inc.*, 125 F.3d 1396 (CA11 1997). (J.A. A-30). The court of appeals rejected the district court's conclusion that the "or otherwise"

language of the statute was not intended to have any effect in states where a copy of the complaint must be delivered when service of process is effected, finding that the meaning of the statute was clear. (J.A. A-27). The court found:

An interpretation that started the clock running *before* the complaint landed in the defendant's hands could "thwart the obvious purpose" of the New York amendment, but today's reading does not do that. Rather, it puts defendants in other states on the same footing as those in New York: they have thirty days to remove after they see the filed complaint. It does not thwart Congress's intent to apply the amendment nationwide unless Congress indicated an intent to limit it to New York and like states. The indication is in fact to the contrary: the Senate report accompanying the amendment states that "[i]t is believed that this will meet the varying conditions of practice *in all the States*." And the stated intent for the 1948 amendments was to make practice identical from state to state; making other states different from New York thwarts *that* intention. So the plain meaning stands.

(J.A. A-29). The court concluded that "the thirty-day removal period begins to run when a defendant actually receives a copy of a filed initial pleading by any means." (J.A. A-27). The court held that the time period for removal in this case commenced when the faxed, courtesy copy of the complaint was received by Mr. Moskowitz on January 29, 1996, and that the notice of removal, filed forty-four days later, was untimely. (J.A. A-27). The court reversed and remanded the case with instructions to the district court to remand the action to state court. (J.A. A-30).

SUMMARY OF THE ARGUMENT

This case presents the issue whether service of process is a necessary prerequisite to the commencement of the 30-day time period for removal. Title 28, section 1446(b) requires that notice of removal be filed "within thirty days after receipt by the defendant through service or otherwise of a copy of the initial pleading...." 28 U.S.C. § 1446(b). Reading the language of § 1446(b) in the context of the entire removal statute, considering the intent and purpose of Congress and interpreting the operative language consistently and in a manner that avoids conflict with other provisions leads to but one conclusion: the removal period commences only after service of process and receipt of the initial pleading.

Relying upon the plain meaning of the phrase "receipt ... through service or otherwise", the Eleventh Circuit concluded in this case that the thirty-day removal period begins to run from the defendant's receipt of the complaint, regardless of whether service of process has been perfected. At first blush, this plain-meaning analysis has some appeal, so long as the analysis focuses solely on the words "receipt ... through service or otherwise." However, the proper meaning of a statute cannot be ascertained from one phrase. When read in the context of the entire removal statute, as the rules of statutory construction require, the language of § 1446(b) is obviously ambiguous.

Although the meaning and scope of many of the terms used in § 1446(b) are open to question, probably the clearest indication of the statute's ambiguity results from the use of the term "defendant" in § 1441(b). Section 1441(b) provides that an action is removable, when federal jurisdiction is not based upon a federal question, "only if none of the parties in interest properly joined and served as defendants is a citizen of the state in which the action is brought." 28 U.S.C. § 1441(b). Thus, the term "defendant" means a party who has been properly joined and

served. Rules of statutory construction dictate that identical words used in different parts of the same act be construed consistently. Applying the § 1441(b) meaning of "defendant" to § 1446(b), leads to the inescapable conclusion that receipt of the initial pleading by a party named as a defendant does not trigger the time for removal in the absence of service of process. A party who receives the complaint is not a "defendant" who is required to remove unless and until he is served with process. Consequently, service of process must be a prerequisite to the commencement of the removal period.

The Eleventh Circuit's "plain meaning" analysis cannot withstand scrutiny. Reading the language of § 1446(b) in the context of the entire removal statute indicates that both service of process and receipt are required prior to the commencement of the removal period. The legislative history of § 1446(b) and its interrelation with other laws supports this interpretation.

Prior to 1948, a defendant could remove a case at any time up to the time he was required to file a responsive pleading under state law. Because of wide variations in state law procedures, there was great disparity among the states as to the time period for removal. Consequently, when the Judicial Code was revised in 1948, Congress sought to establish greater uniformity in the time period allowed for removal. In that regard, § 1446(b) was enacted, requiring that removal take place within twenty days after commencement or service, whichever was later. However, this led to inequities in certain states like New York, where an action was commenced by service of a summons without any requirement that a complaint be filed or served. The time period for removal could expire before the defendant had access to the complaint from which to determine whether the action could or should be removed.

Congress sought to correct this problem by amending the statute in 1949. As amended, § 1446(b) required removal within twenty days of "receipt by the defendant through service or

otherwise of a copy of the initial pleading.” Nothing in the legislative history suggests that this amendment was intended to require that a defendant remove an action prior to service of process. The amendment was intended to do nothing more than to assure that defendants in states like New York had access to the complaint before they had to decide whether to remove. If the 1949 amendment was intended to dispense with the need for service prior to removal, a relatively significant change in procedure, some discussion or reference to that fact surely would be found in the legislative history. The absence of any such reference clearly indicates that Congress intended that service of process would continue to be required prior to removal.

Interpreting § 1446(b) as abrogating the need for service prior to commencement of the removal period creates conflicts with other statutes and with Fed.R.Civ.P. 81(c). Such conflicts do not exist if service is required prior to removal. If the time for removal runs from receipt of the complaint without service of process, then a defendant could be required to remove a case at a time when he need not even be considered under § 1441(b) in determining whether the action is removable. Moreover, if the language of § 1446(b) is interpreted to require only receipt and not service, then the identical language in Rule 81(c), which was added at the same time and for the stated purpose of consistency, must also be so interpreted. If so interpreted, a defendant could be required to remove and to file a responsive pleading prior to service of process -- a result at odds with fundamental precepts of federal procedure. If Rule 81(c) requires service of process, logic dictates that § 1446(b) also requires service of process.

The service rule is the proper interpretation of § 1446(b). The language of this section, considered in the context of the other removal statutes, indicates that service of process is a necessary prerequisite to the commencement of the removal period. This interpretation is most consistent with the history of the statute and with the purpose for which the statute was amended. More-

over, this interpretation promotes consistency and avoids friction with other statutes and comports with notions of fundamental fairness upon which the removal statutes are based. Finally, the service rule interpretation of § 1446(b) provides a clear rule that is easily understood and applied.

Service of process and receipt are both required prior to commencement of the removal period. Murphy filed its notice of removal within thirty days of service of process. Consequently, the Court of Appeals erred in finding that the notice of removal was untimely. The judgment of the Court of Appeals should be reversed.

ARGUMENT

Section 1446(b) requires that notice of removal be filed within thirty days of "receipt by the defendant, through service or otherwise, of a copy of the initial pleading." For nearly fifty years the lower courts have struggled with the proper interpretation of this language. Two lines of authority have emerged. The "receipt rule" cases hold that the time period for removal begins to run upon receipt by the defendant of the initial pleading, regardless of whether service has been perfected and regardless of how the defendant comes into possession of the complaint. See, e.g., *Pic-Mount Corp. v. Stoffel Seals Corp.*, 708 F. Supp. 1113 (D. Nev. 1989); *Tyler v. Prudential Ins. Co.*, 524 F. Supp. 1211 (W.D. Pa. 1981). The "service rule" or "proper service" cases hold that the time period for removal begins to run only when the defendant has been served with process and has received a copy of the initial pleading. See, e.g., *Bowman v. Weeks Marine, Inc.*, 936 F. Supp. 329 (D. S.C. 1996); *Love v. State Farm Mut. Auto Ins. Co.*, 542 F. Supp. 65 (N.D. Ga. 1982).

The United States Court of Appeals for the Eleventh Circuit adopted the receipt rule in this case, joining the fifth, sixth and seventh circuits.¹ The district courts in the other circuits remain clearly divided on the issue.² Commentators also disagree as to

¹ See *Reece v. Wal-Mart Stores, Inc.*, 98 F.3d 839 (CA5 1996); *Roe v. O'Donohue*, 38 F.3d 298 (CA7 1994); *Tech Hills II Assocs. v. Phoenix Home Life Mut. Ins. Co.*, 5 F.3d 963 (CA6 1993).

² See, e.g., *Joiner v. Kaywal Transp., Inc.*, 979 F. Supp. 1252 (W.D. Ark. 1997)(receipt rule); *Boyles v. Junction City Foundry, Inc.*, 992 F. Supp. 1246 (D. Kan. 1997) (receipt rule); *Bowman v. Weeks Marine, Inc.*, 936 F. Supp. 329 (D.S.C. 1996)(service rule); *Bullard v. American Airlines, Inc.*, 929 F. Supp. 1284 (W.D. Mo. 1996)(service rule); *Speilman v. Standard Ins. Co.*, 932 F. Supp. 246 (N.D. Cal. 1996)(receipt rule); *Colegio de Ingenieros y Agrimensores De Puerto Rico v. CNE Consulting, Inc.*, 896 F. Supp. 241 (D.P.R. 1995) (receipt rule); *Kluksdahl v. Muro Pharmaceutical, Inc.*, 886 F.

(Footnote 2 continued on next page)

the proper interpretation of § 1446(b).³ For the reasons discussed in detail below, the "service rule" is the proper interpretation of the statute. The judgment of the court of appeals in this case, therefore, must be reversed.

I. The language of 28 U.S.C. § 1446(b) is ambiguous.

The construction of any statute must begin with the language of the statute itself. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). If the meaning of the statute is clear and unambiguous, the language of the statute is conclusive, unless "literal application of the statute will produce a result demonstrably at odds with the intention of its drafters." 489 U.S. at 242; (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571(1982)). The proper meaning of a statute cannot be ascertained based solely upon the wording of one phrase. To the contrary, "in interpreting a statute, the court will look not merely to a particular clause in which the general words may be used, but will take in connection with it the whole statute ... and the objects and policy of the law...." *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983)(quoting *Brown v. Duchesne*, 19 How. 183 (1857)). "A statute like any other living organism, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated. ... The meaning of

(Footnote 2 continued)

Supp. 535 (E.D. Va. 1995)(receipt rule); *Apache Nitrogen Prod., Inc. v. Harbor Ins. Co.*, 145 F.R.D. 674 (D. Ariz. 1993)(service rule); *Estate of Baratt v. Phoenix Mut. Life Ins. Co.*, 787 F. Supp. 333 (W.D. N.Y. 1992)(service rule); *Gates Construction Corp. v. Kochak*, 792 F. Supp. 334 (S.D. N.Y. 1992)(receipt rule); *Greensmith Co. v. Bearden*, 796 F. Supp. 812 (D. N.J. 1992)(receipt); *Hill v. Boston*, 706 F. Supp. 966 (D. Mass. 1989)(service rule).

³ Compare Donna Rohwer, *The Forty-Year Dispute: What Triggers the Start of the Removal Period Under 28 U.S.C. Section 1446(B)*, 61 UMKC L. Rev. 359 (Winter 1992) with Robert P. Faulkner, *The Courtesy Copy Trap: Untimely Removal From State to Federal Court*, 52 Md. L. Rev. 374 (Winter 1993).

such a statute cannot be gained by confining inquiry within its four corners'." *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 516 n.8 (1992)(quoting *United States v. Monia*, 317 U.S. 424, 432 (1943)(dissenting opinion)). Whether a statute is ambiguous is determined "by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

The language of § 1446(b), considered in the environment of the other removal statutes, is obviously ambiguous. Section 1446(b) states:

The notice of removal of a civil action or proceeding shall be filed *within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading* setting forth the claim for relief upon which such action is based or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

28 U.S.C. § 1446(b) (emphasis added). The language of the statute raises numerous questions of interpretation: Who qualifies as a "defendant"?; What constitutes "receipt"?; What manner of "receipt" is encompassed within "service or otherwise"?; What is a "copy"?; What qualifies as an "initial pleading"? The terms used in § 1446 are not specifically defined in the removal statute, and they have been subject to varying and often conflicting interpretations in the lower courts.⁴ Courts that have adopted

⁴ See Robert F. Koets, Annotation, *What Constitutes "Initial Pleading" for Purposes of Computing Time for Removal of Civil Action from State to Federal Court Under 28 U.S.C.S. §1446(b)*, 130 A.L.R. Fed. 581 (1996); Brian Sheppard, Annotation, *When Does Period for Filing Petition for Removal of Civil Action from State Court to Federal District Court to Run Under 28 U.S.C. § 1446(b)*, 139 A.L.R. Fed. 331 (1997).

the receipt rule have relied in large measure upon the "plain meaning" of the phrase "receipt ...through service or otherwise." See, e.g., *Pillin's Place, Inc. v. Bank One*, 771 F. Supp. 205 (N.D. Ohio 1991); *Conticommodity Servs., Inc. v. Perl*, 663 F. Supp. 27, 30 (N.D.Ill. 1987). However, the near half century of disagreement among the lower courts as to the proper interpretation of the statute belies any "plain meaning." To conclude that the statute has a plain meaning, one must focus only on the five words "receipt ...through service or otherwise" and ignore the other language of section 1446, its legislative history and the terminology of other removal statutes.⁵

Considering all the language of § 1446(b) in the context of the other removal statutes, the meaning of § 1446(b) is anything but plain. Although the phrase "receipt ... through service or otherwise" is at least arguably ambiguous in and of itself,⁶ the language of § 1441 provides the clearest proof of the ambiguity inherent in the language of §1446(b).

Section 1441(b) provides that "any other such action shall be removable only if *none of the parties in interest properly joined and served as defendants* is a citizen of the state in which the action is brought." 28 U.S.C. § 1441(b) (emphasis supplied). The time period for removal under § 1446(b) does not begin to run until receipt by "the defendant" of a copy of the initial pleading. According to the language of § 1441(b), a "defendant" who must be considered for removal purposes is "a party in

⁵ See Rohwer, *supra* note 3 at 370. ("To successfully determine that this statute is not ambiguous requires "the narrowest of vision; the statutory language must be taken outside the context of the surrounding statute and the other removal statutes; the language must be analyzed apart from the legislative and case law history; and definitions of terms must not be questioned.").

⁶ Indeed, the words "or otherwise" used the statute have been described as "so vague as to have no meaning." *Marion Corp. v. Lloyds Bank, PLC*, 738 F. Supp. 1377, 1379 (S.D.Ala. 1990).

interest [who has been] properly joined and served.” Rules of statutory construction dictate that the term “defendant” be ascribed the same meaning in § 1446 and in § 1441. *C.I.R. v. Lundy*, 516 U.S. 235, 250 (1996) (Interrelationship and close proximity of statutory provisions presented a classic case for application of normal rule of statutory construction that identical words used in different parts of same act are intended to have the same meaning); *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 568 (1995) (Acts of Congress should not be read as series of unrelated and isolated provisions; terms should be given consistent meanings throughout). Because an unserved party is not a “defendant” for purposes of removal, receipt of the complaint by a party named as a defendant cannot trigger the time period for removal in the absence of service of process. Certainly, the time period for removal cannot commence before a named party becomes a “defendant” for removal purposes. At the very least, the language of sections 1441(b) and 1446(b), when read together, demonstrates that ambiguity exists as to the meaning of § 1446(b).

When such ambiguity exists, the Court must examine all available sources of information to ascertain the meaning of the statute. However, the purpose and intent of Congress in enacting the statute are key to the proper interpretation. See *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) (when “interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with the whole statute (or statutes on the same subject) and the object and policy of the law, as indicated by its various provisions and give to it such a construction as will carry into execution the will of the legislature”).

II. The legislative history of 28 U.S.C. § 1446(b) and the historical context in which the 1949 amendment was adopted indicate that Congress intended to require both service of process and receipt before the time period for removal commences.

Beginning in 1944, Congress undertook to completely revise and recompile Title 28 and Title 18 of the United States Code. That effort culminated in the 1948 revision to Title 28 and Title 18. See 1948 U.S.C.C.S. 1487 (special pamphlet) (outline of history). The statutory provisions relating to the time for removal were revised and codified at 28 U.S.C. § 1446(b). Section 1446(b) was subsequently amended in 1949 to include the language that is at issue in this case requiring that removal take place within twenty days⁷ of “receipt by the defendant, through service or otherwise, of a copy of the initial pleading.”

Prior to the 1948 revision, a defendant could remove a case anytime before the expiration of his time to respond to the complaint under State law. The time limits for responding to a complaint varied from state to state. A defendant could have only 10 days after service to respond, and therefore to remove, in one state and 30 or 60 days to respond and remove in another state.

When the 1948 revisions to the removal statute were enacted,⁸ Congress sought to establish uniformity in the time period for

⁷ The statute was amended in 1965 to extend the time period from twenty days to thirty days. S. Rep. No. 712, reprinted in 1965 U.S.C.C.S. 3245.

⁸ The changes made to the removal statute in 1948 were part of a complete revision and recompile of Titles 18 and 28 of the United States Code. The legislative history of the 1948 revision is voluminous and was published as a special pamphlet of the United States Code Congressional Services. See 1948 U.S.C.C.S. 1487 (special pamphlet). The portions of the legislative history contained in the Special Pamphlet that relate specifically to 28 U.S.C. § 1446(b) are reprinted in the Appendix at A-3.

removal. Congress discarded the prior language and enacted § 1446(b), which required that the defendant remove within twenty days “after commencement of the action or service or process, whichever [was] later.” 16 MOORE’S FEDERAL PRACTICE ¶ 107 App.01[1] (3d ed.). The reviser’s note states that “subsection (b) makes uniform the time for filing petitions to remove all civil actions within twenty days after commencement of action or service of process whichever is later As thus revised, the section will give adequate time and operate uniformly throughout the Federal jurisdiction.” Reviser’s Notes to 28 U.S.C. § 1446(b), *reprinted in* 1948 U.S.C.C.S. 1487, 1857 (special pamphlet); (App. A- 3).

It became apparent very quickly, however, that the 1948 version of section 1446(b) did not “give adequate time and operate uniformly” in all jurisdictions as Congress had anticipated. In New York, for example, a case could be commenced by serving the defendant with a summons without filing or serving a complaint. Under the 1948 revision, the removal period could expire before the defendant even received a copy of the complaint from which he could determine whether the case was removable.

The 1949 amendment to § 1446(b) was aimed at correcting the resulting inequities. Senate Report Number 303 notes:

Section 83 of the bill as it passed the house makes a major change in the law concerning the removal of cases from State courts to Federal courts. In some States suits are begun by the service of a summons or other process without the necessity of filing any pleading until later. As the section now stands, this places the defendant in the position of having to take steps to remove a suit to Federal court before he knows what the suit is about. As said section is herein proposed to be rewritten, a defendant is not required to file his petition for removal until 20 days after he has received (or it has been made available to him) a copy of the

initial pleading filed by the plaintiff setting forth the claim upon which the suit is based and the relief prayed for. It is believed that this will meet the varying conditions of practice in all States.

S. Rep. No. 303 (April 26, 1949), *reprinted in* 1949 U.S.C.C.S. 1248, 1253-54 (emphasis supplied). *See also* H.R. Rep. No. 352 (March 30, 1949), *reprinted in* 1949 U.S.C.C.S. 1248, 1268.⁹ Professor James Moore, a special consultant to the Advisory Committee to the Committee on the Judiciary, explained the purpose and intention behind the 1949 amendment:

Originally, § 1446(b) provided: “The petition for removal of a civil action or proceeding may be filed within twenty days after commencement of the action or service or process, whichever is later.” Since there are so many diverse state methods for the commencement of an action, and since in some states an action is commenced by the service of process and without the necessity of serving a complaint, the amendatory Act of 1949 revised § 1446(b) so that it would mesh better with all the divergent state practices, but *with the underlying principle of subsection (b) to remain undisturbed*. This principle is that the petition for removal of a civil action or proceeding is to be filed with the federal district court within a definite time period; and that the time period be a relatively short one.

James Wm. Moore, Moore’s Commentary on the U.S. Judicial Code, ¶ 0.03(42), pp. 272-73 (1949) (emphasis supplied).

Integral to an analysis of this legislative history and to ascertaining Congress’ purpose and intent in amending the statute is an understanding of the context in which Congress was acting. *See Steelworkers v. Weber*, 443, U.S. 193, 201 (1987)(statute

⁹ The relevant legislative history with respect to the 1949 amendment to 1446(b) is reprinted in the Appendix at A-4– A-7.

must “be read against the backdrop of the legislative history ... and the historical context from which the Act arose”). Several factors are of particular significance in this regard. First, the starting point from which Congress undertook the 1948 revision was that the removal statutes - since the time the right of removal was first granted in 1789 - had always presupposed that service of process would be perfected prior to the time the defendant was required to remove. See 28 U.S.C. §72 (1940); Judiciary Act of 1789, ch. 20, §12, 1 stat.73. Service of process was made an explicit requirement in the 1948 revision by tying the commencement of the removal period to commencement and service. In addition, it was well-established that due process requires service of process in order for a court to acquire jurisdiction over a party named as a defendant. *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444-45 (1946) (“Service of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served.”). The concept that a defendant’s rights could not be prejudiced prior to the court’s acquisition of personal jurisdiction by way of service of process was well-understood. See *Pennoyer v. Neff*, 95 U.S. 714, 722 (1878).

Nothing in the legislative history of the 1949 amendment indicates that Congress intended to abrogate the requirement that service of process be perfected prior to the commencement of the time for removal.¹⁰ As noted above, Congress’ “point of reference” in considering the 1949 amendment was that a defendant

¹⁰ In *Bullard v. American Airlines, Inc.*, 929 F. Supp. 1284, 1286 (W.D. Mo. 1996), the court recognized that the 1949 amendment was “designed as procedural safeguards, not as a tool for the circumvention of the well established rules regarding service of process.” See also *Rodriguez v. Hearty*, 121 F. Supp. 125, 128 (S.D. Tex. 1954) (noting that the receipt rule would force out-of-state defendants to choose “between removing and waiving their right to proper service or waiting for service and waiving their right to remove”).

need do nothing prior to service (1) because due process requires service before the court can exercise jurisdiction over a defendant and (2) because the removal statutes require service prior to removal. If Congress intended to abrogate that long-standing requirement of service prior to removal -- a significant change in procedure -- one would certainly expect some notation to that effect in the legislative history.

The legislative history and Professor Moore’s commentary clearly indicate that the 1949 amendment was intended merely to toll the removal time in those jurisdictions where defendants do not have access to the complaint when they are served.¹¹ Congress sought to *delay* commencement of the removal period to assure that all defendants had a full twenty days to remove from the time they received a copy of the complaint when service already had been perfected -- not to *expedite* commencement of the removal period to assure that no defendant had more than twenty days to remove from receipt of the complaint before service was perfected. Congress was attempting to correct a problem that arose in only a few jurisdictions by reason of the fact that the defendant was not provided with a copy of the complaint when service was perfected. The logical means of correcting that problem was to *add* a requirement that the defendant receive a copy of the complaint, not to *discard* the service requirement completely. There is no suggestion in the history that Congress intended or anticipated that this revision would have the effect of displacing service as a prerequisite to removal. Significantly, the amendment was *not* intended to change the underlying principles behind § 1446(b). One of the

¹¹ The 1949 amendment included an alternative time period for removal. That alternative time period was added to deal with anticipated problems in jurisdictions where a suit could be commenced by filing a complaint, but service of process could be perfected simply by serving a summons alone. H.R. Rep. No. 352 (March 30, 1949), reprinted in 1949 U.S.C.C.S. 1248, 1268.

principles underlying the removal statutes was that a defendant is not required to respond to the complaint or take any other action until after service of process is perfected and the court acquires jurisdiction over that defendant.

The legislative history of § 1446(b) indicates that the 1949 amendment was intended to add receipt as an additional prerequisite to the commencement of the removal period. This interpretation is much more consistent with the history and purpose of the 1949 amendment than is the receipt rule interpretation.

III. Interpreting § 1446(b) to require service and receipt avoids conflicts with other removal statutes and with the Federal Rules of Civil Procedure.

As discussed above, § 1441(b) limits the parties who must be considered in determining whether a case is removable to the parties in interest who have been properly joined and served as defendants. The exclusion of unserved and improperly joined parties from consideration in determining removability indicates that the time period for removal cannot begin to run until a party has been formally made a party defendant by service of process.¹² See *supra* pp.13-14.

Moreover, the interplay between § 1446(b) and § 1441(b) demonstrates that the receipt rule is at odds with Congress' intent. If the time for removal runs from the time a defendant receives the complaint, whether or not service has then been perfected, a named defendant could be required to remove a case (or lose his right to do so) at a time when he need not even be

¹² Section 1446(a) also reflects some expectation that service of process will be perfected prior to removal. That section requires a defendant to file a notice of removal and to attach to the notice "a copy of all process, pleadings and others served" upon the defendant. The language of § 1446(a) contemplates that at the time of removal the defendant will have been served with "process, pleadings and orders."

considered in determining whether the action is removable under § 1441(b).

Further complicating matters with a receipt rule interpretation is the prevailing view that the time period for removal runs for all defendants concurrently.¹³ With the receipt rule in place, *all* defendants could lose their right to a federal forum based on the actions of a defendant who has not been served (and perhaps cannot be served) and who need not otherwise be considered in the removal equation.¹⁴ All the defendants could be deemed to have waived their rights to remove because of inaction on the part of a party who need not even be considered in determining whether the case is removable, nor join in the removal petition. Certainly, Congress did not intend this absurd result. No such problems arise if both service and receipt are required before the removal period commences.

The receipt rule also conflicts with Rule 81(c) of the Federal Rules of Civil Procedure. Rule 81(c) governs procedures after

¹³ This Court has not considered whether a separate period for removal applies for each defendant or the time period runs concurrently for all defendants. However, the prevailing view appears to be that the removal period runs concurrently for all defendants beginning at the time it commences for the first defendant. See *Getty Oil Co. of Texas v. Ins. Co. of N. Am.*, 841 F.2d 1254, 1262-63 (CA5 1988); 16 MOORE'S FEDERAL PRACTICE ¶ 107.30[3][a] (3d ed.). But see *McKinney v. Board of Trustees of Mayland Community College*, 955 F.2d 924, 928 (CA4 1992) (holding that each defendant has 30 days from date he is served to decide whether to remove or join in removal). If the first defendant waives his right to remove by allowing the removal period to expire, it precludes the other defendants from removing.

¹⁴ Consider, for example, defendant One, who is provided a "courtesy copy" of a complaint which also names two other defendants. More than thirty days later, service is perfected upon defendants Two and Three. Defendant One need not be considered in determining whether the action is removable, and he is not required to join in the removal. However, Defendant One's failure to remove within thirty days of his early receipt of the complaint bars the other defendants from removing.

removal and contains the same language as § 1446(b), requiring that a defendant respond to the complaint

within 20 days after *receipt through service or otherwise of a copy of the initial pleading...*, or within 20 days after the service of a summons on such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever is longer.

FED. R. CIV. P. 81(c) (emphasis supplied). The emphasized language was added to Rule 81(c) and to section 1446(b) contemporaneously. The language was added to 81(c) for the expressed purpose of making the Rule consistent with section 1446(b).¹⁵ Logic and accepted principles of statutory interpretation dictate that the language “receipt through service or otherwise of a copy of the initial pleading” was intended to mean the same thing in the statute and in the rule. *See C.I.R. v. Lundy*, 516 U.S. 235, 250 (1996) (Interrelationship and close proximity of statutory provisions presented a classic case for application of normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning). Consequently, if mere receipt of the initial pleading is the proper interpretation of the language, as the court of appeals held in this case, then a named defendant can be required to remove a case and to respond to the complaint without ever

¹⁵ The amendment to Rule 81(c) was effectuated shortly before the amendment to 28 U.S.C. § 1446(b). The Advisory Committee Notes to the proposed amendment to Rule 81(c) state: “The need for revision of the third sentence of [Rule 81(c)] is occasioned by the procedure for removal set forth in revised title 28, U.S.C. § 1446 ... The revised third sentence of Rule 81(c) is geared to this proposed statutory amendment...” Committee Note of 1948 Advisory Committee’s Proposed Amendment to Subdivision (c), *reprinted in* 7 MOORE’S FEDERAL PRACTICE ¶ 81.01[18] (2d ed. 1992);(App.A-8).

having been served with process pursuant to either state or federal law.¹⁶

Abrogation of the requirement of service of process, even if only in a limited number of cases, would be a profound change in procedure. If the receipt rule interpretation of the relevant language is the correct interpretation, it leads to the inescapable conclusion that this profound procedural change -- a change with possible constitutional implications -- was made without even a passing note or comment in the legislative history of the statute, the Supreme Court recommendation on adoption of the rule or the Advisory Committee Comments to Rule 81(c). The absence of any such note or comment is a clear indication that the “receipt rule” interpretation of the operative language is not what was intended.

Courts that have been called upon to interpret the relevant language in Rule 81(c) have recognized this problem and have concluded that the drafters could not have intended the “receipt by service or otherwise” language in the Rule to include receipt of the complaint in the absence of service of process. In *Silva v. City of Madison*, 69 F.3d 1368 (CA7 1995), *cert. denied*, 134

¹⁶ At first blush it might appear that the second alternative time period (“20 days after the service of a summons on such initial pleading, then filed”) would assure that service has been perfected before the defendant is required to file a responsive pleading. However, as originally proposed, the 1948 amendment to Rule 81(c) did not include this second time period. It was added when the Rule was adopted by the Court for the specific purpose of dealing with the problems arising from state procedural rules that allow service without any requirement that the complaint be attached or otherwise provided. The history of the Rule demonstrates that the second alternative was intended to apply only in jurisdictions where the procedural rules do not require delivery of the complaint. *See* Supreme Court Advisory Committee’s Proposed 1948 Amendment to Subdivision (c); Supreme Court Advisory Committee Note of 1948 Proposed Amendment to Subdivision (c), and Explanatory Note to Rule 81(c) as Amended in 1948, *reprinted in* 7 MOORE’S FEDERAL PRACTICE ¶ 81.01[17] at 81-29 to 81-30, ¶ 81.01[18] at 81-30 to 81-31 & ¶ 81.01[19] at 81-31 to 81-32 (2d ed.). The referenced history is reprinted in the Appendix at A-7-A-11.

L.Ed.2d 522 (1996), for example, the Seventh Circuit held that service of process was necessary before a defendant was required under Rule 81(c) to file a responsive pleading. In reaching that conclusion, the court examined the history of Rule 81(c) and its relationship to section 1446(b) and concluded that the second alternative time period under Rule 81(c) (twenty days after service of summons upon an initial pleading then filed) did not apply in a state where the complaint must be served along with the summons when service of process is perfected.¹⁷ 69 F.3d at 1375.

The court then was faced with deciding whether the first alternative time period under Rule 81(c), requiring a responsive pleading within twenty days after receipt of the complaint

¹⁷ The court noted in this regard:

Congress' amendment of § 1446(b) and the amendment of Rule 81(c) addressed the identical concern -- if service were all that was required to trigger the time for removal, a defendant in a state that did not require delivery of the complaint in order to effectuate service might have to remove an action before he received the complaint. Accordingly, § 1446(b) was amended to require that a defendant have access to the complaint before he had to remove the action and, to be consistent with § 1446(b), rule 81(c) was amended to require that the defendant have access to the complaint before he had to file a responsive pleading.

We believe the foregoing discussion [of the history of § 1446(b) and Rule 81(c)] demonstrates that, although the plain language of Rule 81(c) can be read to apply all three time periods set forth in the Rule to all removal cases, this interpretation is not compatible with the intent of the drafters of either § 1446 or of Rule 81. *It is clear that the second time period was not intended to apply in a state in which, when service is effected, the complaint is served along with the summons. See Savarese v. Edrick Transfer & Storage, Inc.*, 513 F.2d 140, 143 (9th Cir. 1975) ("[W]e conclude that the second clause of rule 81(c) applies only to cases arising in states which do not require service of both a summons and complaint.").

Silva, 69 F.3d at 1374-1375 (emphasis supplied).

"through service or otherwise", applied if proper service had not been perfected. 69 F.3d at 1375. The court noted that because receipt of the complaint triggers both the removal period under § 1446(b) and the time period within which a responsive pleading must be filed under Rule 81(c), "a defendant could be required both to remove an action to federal court and to file a responsive pleading before proper service is effected." 69 F.3d at 1375. The court acknowledged that it had previously held in *Roe v. O'Donohue*, 38 F.3d 298 (CA7 1995), that the "plain language" of § 1446(b) must be applied to require that a defendant remove a case within thirty days of receipt of the complaint, regardless of whether service has been perfected. The court also acknowledged that "it could be argued" that the identical language in Rule 81(c) should be read in a manner consistent with the *Roe* interpretation -- that is, to require that the defendant file a responsive pleading within twenty days of receipt of the complaint regardless of whether service had been perfected. However, the court refused to apply the "plain meaning" interpretation of *Roe* to the language of Rule 81(c).¹⁸

[W]e perceive nothing in the statute, the rule or their respective legislative histories that would justify our concluding that the drafters, in their quest for evenhandedness and promptness in the removal process, intended to abrogate the necessity for something as fundamental as service of process. It simply is not reasonable for us to conclude that it was intended that such a major exception to the clear mandates of Rules 4 and 12 be undertaken without any express mention of such a consequence. It is one thing to require removal before service is effected; it is quite another to require a party to file a responsive pleading. Requiring

¹⁸ In *Roe*, the court did not analyze the implications of the receipt rule on Rule 81(c). Rather, the court relied upon the plain meaning of the statute, noting that "courts are not authorized to disregard express language just because the legislative history does not echo 'and we really mean it!'" 38 F.3d at 303.

a responsive pleading before service is effected is at odds with a fundamental principle of federal procedure -- that a responsive pleading is required only after service has been effected and the party has been made subject to the jurisdiction of the federal courts. . . . As the court stated in *Apache Nitrogen Prods., Inc. v. Harbor Ins. Co.*, 145 F.R.D. 674 (D. Ariz. 1993), "[w]hile it is conceivable that Congress might wish to establish a different standard, outside the boundaries of Rule 12, to govern response time in removed actions ...[,] [i]t is unimaginable ... that such a significant alteration in the Federal Rules of Civil Procedure would be effected without mention by the Advisory Committee, the Supreme Court, or Congress itself." *Apache*, 145 F.R.D. at 680.

Of course, the drafters might have decided to create a new service requirement to be used only in removal cases, one which does not comply technically with the traditional requirements of service in federal cases (Fed.R.Civ.P. 4) but which nonetheless meets the requirements of procedural due process. However, Rule 81(c) does not purport, either in its language or in its legislative history, to create any "new" service requirement. All that it requires is delivery of a complaint.

69 F.3d at 1376-77. Thus, the court read the language "receipt by service or otherwise of a copy of the initial pleading" in Rule 81(c) to impose no obligation upon the defendant to file a responsive pleading until after he is properly served with process.

The Seventh Circuit's analysis of Rule 81(c) is accurate. Nothing in the statute, the rule or their respective legislative histories justifies the conclusion that the drafters, in their quest for evenhandedness and promptness in the removal process, intended to abrogate the necessity for something as fundamental as service of process. *Silva*, 69 F.3d at 1377. However, the

Seventh Circuit failed to acknowledge the import of this conclusion on the analysis of § 1446(b). If the operative language was not intended to abrogate the requirement of service of process for purposes of the Rule, that same language clearly was not intended to abrogate the requirement of service of process for purpose of the statute either.¹⁹

Historically, service of process was required both prior to the time for removal and prior to the time to respond to a complaint. The amendments to the Rule and the removal statute were made for the same purpose, were made contemporaneously, and included the same language. To interpret the identical language differently is contrary to logic, reason and well-settled rules of statutory interpretation. See *Communications Workers of America v. Beck*, 487 U.S. 735, 745-47 (1988). Indeed, it is nonsensical to hold that language added to a statute and a rule in the same time period and for the purpose of consistency between the two was not intended to have the same meaning.

The interrelation between § 1446(b) and Rule 81(c) and the use of the identical language in the amendments to both documents demonstrates that the drafters assumed that service of process would be perfected before removal was required. Interpreting the statutory language to require both service of process

¹⁹ In *Apache Nitrogen Prods., Inc. v. Harbor Ins. Co.*, 145 F.R.D. 674 (D. Ariz. 1993), the court considered the legislative history of both § 1446(b) and Rule 81(c) in analyzing the meaning of the operative language in Rule 81(c). Like the *Silva* court, the *Apache* court concluded from the legislative history that Congress did not intend to abrogate the requirement of service of process and that the "the twenty day response time under rule 81(c) does not commence until service has been effected." 145 F.R.D. at 680. However, unlike the *Silva* court, the *Apache* court found that the language in the statute and the rule must be interpreted in a consistent manner. Thus, the court concluded that the relevant language in the statute "does not eliminate the requirement that process be served before the thirty day period set by section 1446(b) commences to run." 145 F.R.D. at 680.

and receipt of the complaint avoids any conflict between the statute and the Rule. That interpretation best fulfills the purpose of the 1949 amendments and is in keeping with congressional intent. The service rule is the proper interpretation of the statute.

IV. The justifications cited for the receipt rule are unsound.

Courts that have adopted the receipt rule cite one or more of the following reasons in support of that interpretation of § 1446(b): (1) the plain meaning of the statute; (2) the principle that removal statutes must be read narrowly; and, (3) the need for uniformity. The cited reasons do not justify the conclusion that the receipt rule is the proper interpretation of § 1446(b).

Courts adopting the receipt rule almost always cite the plain meaning of the statutory language to justify their decisions. Indeed, the Eleventh Circuit notes that “[by and large, [its] analysis begins and ends with the three italicized words [receipt ... or otherwise].” (J.A. A-27). However, as demonstrated above, the language of 1446(b) is susceptible of no plain meaning. Considered in the context of the other removal statutes, the meaning of the statutory language is open to varying interpretations. See *Potter v. McCauley*, 186 F. Supp. 146, 149 (D.Md. 1960) (“It is not possible to state definitely ... the precise scope and effect of the word ‘otherwise’ in its context here”). The clear split of authority on this question would not exist if the language had a plain meaning. As the *Apache* court appropriately observed:

The reliance of courts and litigants on claimed “plain meaning” usually represents a conscious disregard of evidence that would lead to an undesired result, and not the existence of true unambiguity. To translate the words “service or otherwise” into terms of meaning requires looking to all available interpretive tools, and not simply relying on the false idol of “plain meaning.”

145 F.R.D. at 679.

Another stated justification for the receipt rule is uniformity. See *Haun v. Retail Credit Co.*, 420 F. Supp. 859, 863 (W.D. Pa. 1976) (concluding that a standard based upon simple receipt of a copy of the initial pleading will “provide a uniform and definite time for a defendant to remove the action.”). The Eleventh Circuit found that the service rule interpretation would thwart Congress’ intent to make practice “identical”²⁰ from state to state. (J.A. A-29). However, the purpose of the 1949 amendment was *not* to make practice identical in every state, but to expand the removal time to correct the problems that had arisen by reason of the 1948 revision. Uniformity was the goal of the 1948 revision, not of the 1949 amendment.

Moreover, like many of the receipt rule cases, the Eleventh Circuit mistakenly assumes that Congress was seeking uniformity with respect to the time of the triggering event, and it reasons that retaining the requirement of service in addition to receipt would prevent uniformity because service rules differ between the states. However, the goal of the 1948 revision was uniformity in the time *period* allowed for removal. If Congress’ goal had been uniformity of the time of the event triggering the removal period, it would not have chosen the later of commencement or service as the triggering event. In 1948, the state laws and rules regarding commencement and service of process varied tremendously -- much more so than they do now. The great majority of states now have adopted procedural rules modeled after or comparable to the Federal Rules of Civil

²⁰ The 1948 amendment was aimed at making practice *uniform* throughout the country, not at making practice *identical*. As a practical matter, making removal practice identical is impossible because the action is commenced in state court where rules regarding pleading and commencement of actions vary. Compare Ala.R.Civ.P. 3 (“A civil action is commenced by filing a complaint with the court”) with N.D.R.Civ.P.3 (“A civil action is commenced by the service of a summons.”)

Procedure. If Congress had been seeking a uniform time for the commencement of the removal period, it certainly would not have tied the removal period to events that must be determined according to the varying provisions of state law. Congress' use of commencement or service in the 1948 revision negates any intent to establish a uniform trigger date for the commencement of the removal period. Consequently, any lack of uniformity caused by a service requirement is not contrary to the goal of either the 1948 revision or the 1949 amendment.

Retaining service of process as a prerequisite to removal does not compromise uniformity, in any event. It simply provides for uniformity on two levels -- service and receipt of the complaint -- both of which are required to trigger the removal period. In most jurisdictions those occur simultaneously, but both are required in *all* jurisdictions.

The receipt rule does not lead to greater uniformity than the service rule. As the Court found in *Estate of Barratt v. Phoenix Mut. Life Ins. Co.*, 787 F. Supp. 333 (W.D.N.Y. 1992):

This court rejects the notion that reliance on receipt instead of proper service would result in a greater degree of uniformity in the federal system. First, I note that it would do so at the expense of state service rules which are in place to assure that the defendant receives notice sufficient to satisfy notions of due process and fair play. Second, it would essentially reward plaintiffs for effecting improper service. The "or otherwise" language of section 1446(b) was not intended to permit a plaintiff to substitute informal or improper service for the traditional requirements of personal service. ... Finally, and perhaps most importantly, it would not provide the clearest rule. Collateral litigation would surely result from arguments over whether the defendant "actually or constructively," received papers which

were improperly served.²¹ ... The simplest and fairest route is to hold that the removal period is not triggered until there has been proper service.

787 F. Supp. at 337 (citations omitted, footnote added). "[I]t seems safe to say that a standard which requires formal service of process promotes certainty far more effectively than one which accepts receipt 'otherwise' as its sole criteria." *Apache*, 145 F.R.D. at 679. The need for uniformity does not support the receipt rule.

The other regularly-cited justification for the receipt rule is the requirement that removal statutes are to be construed strictly and against removal. *See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941). This requirement leads the courts to interpret § 1446(b) in a manner that will most severely restrict the time period for removal. *See, e.g., Conticommodity Services, Inc. v. Perl*, 663 F. Supp. 27, 30-31 (N.D. Ill. 1987). This approach is flawed. *Shamrock Oil & Gas Corp. v. Sheets* holds:

Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.

313 U.S. at 109. This principle dictates that the federal court "not expand its jurisdiction beyond the precise limits set by Congress;" it does not require that "the federal courts do everything in their power to defeat defendants' efforts to remove, regardless

²¹ As predicted, the receipt rule does lead to litigation over when receipt is sufficient to commence the removal time. Interestingly, the courts have employed service of process concepts in resolving these issues. *See, e.g., Tech Hills II Associates v. Phoenix Home Life Mut. Ins. Co.*, 5 F.3d 963, 968 (CA6 1993) ("We hold that delivery at defendant's place of business on a Saturday, when the offices are closed, to a security guard, who is not authorized to receive service on behalf of the corporation, is not receipt under the removal statute.").

of Congress' actual intent." *Apache*, 145 F.R.D. at 680. "[T]he Federal courts ... should be equally vigilant to protect the right to proceed in Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction." *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 186 (1907). Congressional intent for the 1949 amendment was expressed in the reviser's note as the intent to expand the removal time. Application of the strict construction rules emanating from *Shamrock Oil* is in contravention of the express legislative intent for this amendment.²²

The justifications regularly cited in support of the receipt rule do not withstand scrutiny. They do not justify the conclusion that the receipt rule is the proper interpretation of § 1446(b).

V. The service rule interpretation of § 1446 is consistent with the language of the removal statutes and purpose and intent of Congress; it avoids conflicts with other removal statutes and the Federal Rules of Civil Procedure; and it comports with notions of fairness upon which the right of removal is grounded.

The service rule interpretation of § 1446(b) is much more consistent than the receipt rule with the legislative history of the statute and the purpose of the 1949 amendments -- that is, to assure that the time period for removal does not commence from the date of service where the defendant does not have access at the time of service to a copy of the complaint. Such an interpretation is also consistent with the perspective from which Congress approached the amendments -- that is, with the understanding that due process requires service of process before a defendant is required to respond to a complaint and that the removal statutes presuppose service of process prior to the time for removal. The service rule also avoids serious conflicts with the other removal statutes and the Federal Rules of Civil Procedure.

²² See Rohwer, *supra* note 3 at 369.

"[T]he gravamen of removal is fairness."²³ "Congress seems to believe that the defendant's right to remove a case ... is at least as important as the plaintiff's right to the forum of his choice ... [T]he removal procedure is intended to be 'fair to both plaintiffs and defendants alike.'" *McKinney v. Board of Trustees of Mayland Community College*, 955 F.2d 924, 927 (CA4 1992)(citations omitted). Moreover, fairness concerns motivated the 1949 amendment to § 1446(b). The receipt rule promotes inequity rather than fairness. A defendant may be required to remove before he has been brought within the jurisdiction of the court and at a time when he has been lead to believe that the action is "on hold". By contrast, the service rule interpretation comports with the notions of fundamental fairness upon which the right of removal is based.

Finally, the service rule provides a clear rule that is easily understood and applied:

Service of process is a bright line test which traditionally has been the foundation for commencement of an action and which provides the defendant the requisite due process notice that the action has commenced. ... [I]t clearly and succinctly defines the commencement of the removal period thereby dispelling any confusion among the parties and the court. A federal court applying the proper service rule generally has a well defined body of state law which delineates exactly what is "service of process" under the applicable state statute. ... [A] federal court can easily look to state statutes and case law and readily determine the triggering event commencing the thirty-day period. ... [A] much more uniform and logical approach would be for federal courts to rely on this established body of law instead of having to continually re-invent the wheel by attempting

²³ Rowher, *supra* note 3 at 361.

to define the not so plain and unambiguous “or otherwise” language of § 1446(b).

Bowman v. Weeks Marine, Inc., 936 F.Supp. 329, 340 (D.S.C. 1996).

All relevant factors demonstrate that the service rule is the proper interpretation of § 1446(b). The time for removal does not commence until service of process has been perfected on the defendant and the defendant has received a copy of the complaint. In the instant case, Murphy’s time for removal did not commence until it received a copy of the complaint and was served with process. Service of process was perfected on February 12, 1996. Consequently, the removal, effected by notice filed on March 13, 1996, was timely. The district court properly denied Michetti’s motion to remand. The Court of Appeals erred in reversing the district court’s decision.

CONCLUSION

For all the foregoing reasons, the decision of the court of appeals should be reversed and this case remanded for further proceedings in the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Deborah Alley Smith, a member of the Bar of this Court, hereby certify that on this 21st day of December, 1998, three copies of the Brief of Petitioner in the above-entitled case were shipped via Federal Express Priority Overnight, to the following:

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APPENDIX

STATUTORY AND HISTORICAL APPENDIX

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REMOVAL STATUTES

28 U.S.C. § 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

* * *

28 U.S.C. § 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or

proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

* * *

FEDERAL RULES OF CIVIL PROCEDURE

Rule 81(c). Removed Actions.

These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest....

LEGISLATIVE HISTORY OF 1948 REVISION TO TITLE 28

Reviser's Notes, reprinted in 1948 U.S.C.C.S. 1487, 1857 (special pamphlet):

Subsection (b) makes uniform the time for filing petitions to remove all civil actions within twenty days after commencement of action or service of process whichever is later, instead of "at any time before the defendant is required by the laws of the State or the rule of the State court in which suit is brought to answer or plead" as required by section 72 of title 28 U.S.C., 1940 ed. As thus revised, the section will give adequate time and operate uniformly throughout the Federal jurisdiction. The provisions of sections 74 and 76 of title 28, U.S.C., 1940 ed., for filing at any time "before trial or final hearing" in civil rights cases and cases involving revenue officers, court officers and officers of either House of Congress were omitted.

Hearing Before Senate Subcommittee, No. 1, Statement of James William Moore, Professor of Law, Yale University, reprinted in 1948 U.S.C.C.S. 1487, 1969 (special pamphlet):

* * *

REMOVAL

Considerable improvement has been made in stating the procedure for removal. For example, the removal petition is to be filed first with the United States district court and no action by the State court is necessary. See section 1448. This effects a much more workable procedure and less conflicting points of view on jurisdiction than under the present practice where, in the main, the removal petition must first be presented to the State court, although its denial of the petition does not prevent the petitioner from removing the case to the Federal district court, and I believe considerable improvement has been made by

section 1441(c) relative to the removal of separable controversies and separate units -- a matter which is in great confusion at the present time.

LEGISLATIVE HISTORY OF 1949 AMENDMENT TO 28 U.S.C. § 1446

Senate Report No. 303, *reprinted in* 1949 U.S.C.C.S. 1248:

The Committee on the Judiciary, to whom was referred the bill (H.R. 3762) to amend title 18, entitled, "Crimes and Criminal Procedure," and title 28, entitled, "Judiciary and Judicial Procedure" of the United States Code, and for other purposes, having considered the same, report favorably thereon, with amendments, and recommend that the bill, as amended, do pass.

PURPOSE

The purpose of the bill can be shown by quoting the following excerpts from the House report on this bill, as follows:

The bill incorporates in titles 18 and 28 of the United States Code, legislation which was enacted in the latter part of the second session of the Eightieth Congress, either just before or subsequent to the enactment of the revision of those titles on June 25, 1948. It corrects typographical and other minor errors, and clarifies the language of some sections to conform more closely to the original law, or to remove ambiguities which have been discovered. The bill also substitutes corrected phraseology in sections relating to the armed forces to conform to the reorganization of such forces; makes changes of nomenclature in other titles of the code to conform to new title 28; amends the section prescribing procedure for the removal of cases from State courts so as to make it fit the diverse procedural laws of the various States; and repeals inconsistent and superseded laws.

JUDICIAL CONFERENCE COMMITTEE CONTINUED

The Judicial Conference of the United States directed its Committee on Revision of the Judicial Code to continue to work with the revision staff. That committee, consisting of Circuit Judge Albert B. Maris and District Judges Clarence G. Galston and William F. Smith solicited suggestions from all the Federal judges. It asked that any ambiguities and errors which had been discovered in revised titles 18 and 28 be brought to its attention, but cautioned that no substantive changes could be considered in a correction bill.

* * *

[p. 1249] SUGGESTIONS RECEIVED

The Advisory Committee on the Federal Rules of Civil Procedure made constructive suggestions to harmonize the Civil Rules with the provisions of title 28 and amendments of the Civil Rules to this end were adopted by the Supreme Court on December 29, 1948, and reported to the present session of the Congress. Among these amendments is one relating to the removal of causes which follows the lines of the amendment made by section 83 of this bill to section 1446 of title 28.

* * *

[pp. 1253-54]

Section 83 of the bill as it passed the house makes a major change in the law concerning the removal of cases from State courts to Federal courts. In some states suits are begun by the service of a summons or other process without the necessity of filing any pleading until later. As the section now stands, this places the defendant in the position of having to take steps to remove a suit to Federal court before he knows what the suit is about. As said section is herein proposed to be rewritten, a defendant is not required to file his petition for removal until 20

days after he has received (or it has been made available to him) a copy of the initial pleading filed by the plaintiff setting forth the claim upon which the suit is based and the relief prayed for. It is believed that this will meet the varying conditions of practice in all the States.

House Report No. 352, reprinted in 1949 U.S.C.C.S. 1248, 1254:

[p. 1268]

SECTION 83 OF BILL

Subsection (b) of section 1446 of title 28, U.S.C., as revised, has been found to create difficulty in those States, such as new York, where suit is commenced by the service of a summons and the plaintiff's initial pleading is not required to be served or filed until later.

The first paragraph of the amendment to subsection (b) corrects this situation by providing that the petition for removal need not be filed until 20 days after the defendant has received a copy of the plaintiff's initial pleading.

This provision, however, without more would create further difficulty in those States, such as Kentucky, where suit is commenced by the filing of the plaintiff's initial pleading and the issuance and service of a summons without any requirement that a copy of the pleading be served upon or otherwise furnished to the defendant. Accordingly the first paragraph of the amendment provides that in such cases the petition for removal shall be filed within 20 days after the service of the summons.

The first paragraph of the amendment conforms to the amendment of rule 81(c) of the Federal Rules of Civil Procedure, relating to removed actions, adopted by the Supreme Court on December 29, 1948, and reported by the Court to the present session of Congress.

The second paragraph of the amendment to subsection (b) is intended to make clear that the right of removal may be exercised at a later stage of the case if the initial pleading does not state a removable case but its removability is subsequently disclosed. This is declaratory of the existing rule laid down by the decisions. (See for example, *Powers v. Chesapeake etc., Ry. Co.*, 169 U.S. 92.)

In addition, this amendment clarifies the intent of section 1446(e) of title 28, U.S.C., to indicate that notice need not be given simultaneously with the filing, but may be given promptly thereafter.

HISTORY OF FED. R. CIV. P. 81(c)

Advisory Committee's Proposed 1948 Amendment to Subdivision (c), reprinted in 7 MOORE'S FEDERAL PRACTICE ¶ 81.01[17] (2d ed.):

The Advisory Committee proposed in 1948 that Rule 81(c), as amended in 1946, be further amended to read as follows (old matter to be stricken out is in brackets, new matter is in italics):

(c) Removed Actions. These rules apply to civil actions removed to the [district courts of the United States] *United States district courts* from the state courts and govern [all] procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, he shall answer or present the other defenses or objections available to him under these rules within [the time allowed for answer by the law of the state or within 5 days after the filing of the transcript of the record in the district court of the United States, whichever period is longer, but in any event within 20 days after the filing of the transcript] *20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceed-*

ing is based, or within 5 days after the filing of the petition for removal, whichever period is longer. If at the time of removal all necessary pleadings have been [filed] served, a party entitled to trial by jury under Rule 38 and who has not already waived his right to such trial shall be accorded it, if his demand therefor is served within 10 days after the [record of the action is filed in the district court of the United States] petition for removal is filed if he is the petitioner, or if he is not the petitioner within 10 days after service on him of the notice of filing the petition.

The Committee's reasons for the proposed amendment are stated in its Note of 1948.

The Court, however, made some changes in this proposal before promulgating it.

Committee Note of 1948 to Advisory Committee's Proposed Amendment to Subdivision (c), reprinted in 7 MOORE'S FEDERAL PRACTICE ¶ 81.01[18] (2d ed.):

Subdivision (c).--In the first sentence the change in nomenclature conforms to the official designation of district courts in Title 28, USC § 132(a); and the word "all" is deleted as superfluous. The need for revision of the third sentence is occasioned by the procedure for removal set forth in revised Title 28, USC, § 1446. Under the prior removal procedure governing civil actions, 28 USC, § 72 (1946), the petition for removal had to be first presented to and filed with the state court, except in the case of removal on the basis of prejudice or local influence, within the time allowed "to answer or plead to the declaration or complaint of the plaintiff"; and the defendant had to file a transcript of the record in the federal court within thirty days from the date of filing his removal petition. Under § 1446(a) removal is effected by a defendant filing with the proper United States district court "a verified petition containing a short and plain [sic] statement of

the facts which entitled him or them to removal together with a copy of all process, pleadings, and orders served upon him or them in such action." And § 1446(b) provides: "The petition for removal of a civil action or proceeding may be filed within twenty days after commencement of the action or service of process, whichever is later." This subsection (b) gives trouble in states where an action may be both commenced and service of process made without serving or otherwise giving the defendant a copy of the complaint or other initial pleading. To cure this statutory defect, the Judge's Committee appointed pursuant to action of the Judicial Conference and headed by Judge Albert B. Maris is proposing an amendment to § 1446(b) to read substantially as follows: "The petition for removal of a civil action or proceeding shall be filed within 20 days after the receipt through service or otherwise by the defendant of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based." The revised third sentence of Rule 81(c) is geared to this proposed statutory amendment; and gives the defendant at least 5 days after removal within which [sic] his defenses.

The change in the last sentence of subdivision (c) reflects the fact that a transcript of the record is no longer required under § 1446, and safeguards the right to demand a jury trial, where the right has not already been waived and where the parties are at issue--"all necessary pleadings have been served." Only rarely will the last sentence of Rule 81(c) have any applicability, since removal will normally occur before the pleadings are closed, and in this usual situation Rule 38(b) applies and safeguards the right to jury trial. See Moore's Federal Practice (1st ed.) 3020.

Rule 81(c) as Amended in 1948 by the Court, reprinted in 7 MOORE'S FEDERAL PRACTICE ¶ 81.01[19] (2d ed.):

The Advisory Committee's proposed amendment of 1948 to Rule 81(c), set out ... *supra*, was changed in a few respects by the

Court before promulgating the amendment. The Court's 1948 amendment of subdivision (c), as amended in 1946, changed (c) to read as follows (old matter stricken out is in brackets, new matter is in italics):

(c) Removed Actions. These rules apply to civil action [sic] removed to the [district courts of the United States] *United States district courts* from the state courts and govern [all] procedures after removal. Repleading is not necessary unless the court so orders. In a removal action in which the defendant has not answered, he shall answer or present the other defenses or objections to him under these rules within [the time allowed for answer by the law of the state or within 5 days after the filing of the transcript of the record in the district court of the United States, whichever period is longer, but in any event within 20 days after the filing of the transcript] *20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon which initial pleading, then filed,* or within 5 days*

***Court's explanatory Note.--**

"The phrase, 'or within 20 days after the service of summons upon such initial pleading, then filed,' was inserted following the phrase, 'within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceedings is based,' because in several states suit is commenced by service of summons upon the defendant, notifying him that the plaintiff's pleading has been filed with the clerk of court. thus, [sic] he may never receive a copy of the initial pleading. The added phrase is intended to give the defendant 20 days after the service of such summons in which to answer in a removal action, or 5 days after the filing of the petition for removal, whichever is longer. In these states, the 20 day period does not begin to run until such pleading is actually filed. The last word of the third sentence was changed from 'longer' to 'longest' because of the added phrase."

*after the filing of the petition for removal, whichever period is longest. If at the time of removal all necessary pleadings have been filed [filed] [sic] served, a party entitled to a trial by jury under Rule 38 [and who has not already waived his right to such trial**] shall be accorded it, if his demand therefor is served within 10 days after the [record of the action in the district court of the United States] petition for removal is filed if he is the petitioner, or if he is not the petitioner within 10 days after service on him of the notice of filing the petition.*

Committee Note of 1948 to Rule 81, reprinted in 7 MOORE'S FEDERAL PRACTICE ¶ 81App.04[2] (3d ed.):

Subdivision (c). --In the first sentence, the change in nomenclature conforms to the official designation of district courts in Title 28, U.S.C. § 132(a); and the word "all" is deleted as superfluous. The need for revision of the third sentence is occasioned by the procedure for removal set forth in revised Title 28, U.S.C. § 1446. Under the prior removal procedure governing civil actions, 28 U.S.C., § 72 (1946), the petition for removal had to be first presented to and filed with the state court, except in the case of removal on the basis of prejudice or local influence, within the time allowed "to answer or plead to the declaration or complaint of the plaintiff"; and the defendant had to file a transcript of the record in the federal court within thirty days from the date of filing his removal petition. Under § 1446(a) removal is effected by a defendant filing with the proper United States district court "a verified petition containing a short and

** "The phrase, 'and who has not already waived his right to such trial,' which previously appeared in the fourth sentence of subsection (c) of Rule 81, was deleted in order to afford a party who has waived his right to trial by jury in a state court an opportunity to assert that right upon removal to a federal court."

plain statement of the facts which entitled him or them to removal together with a copy of all process, pleadings, and orders served upon him or them in such action." And § 1446(b) provides: "The petition for removal of a civil action or proceeding may be filed within twenty days after commencement of the action or service of process, whichever is later." This subsection (b) gives trouble in states where an action may be both commenced and service of process made without serving or otherwise giving the defendant a copy of the complaint or other initial pleading. To cure this statutory defect, the Judge's Committee appointed pursuant to action of the Judicial Conference and headed by Judge Albert B. Maris is proposing an amendment to § 1446(b) to read substantially as follows: "The petition for removal of a civil action or proceeding shall be filed within 20 days after the receipt through service or otherwise by the defendant of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based." The revised third sentence of Rule 81(c) is geared to this proposed statutory amendment; and gives the defendant at least 5 days after removal within which to file his defenses.